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No. ~~1416~~ 234

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1965

GIULIO BRUNI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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SUMMARY OF THE MATTER INVOLVED

To the Honorable Chief Justice and Associate Justices of the United States:

The petitioner was found guilty by the court, without a jury, as charged in the indictment and a sentence of five (5) years imprisonment was imposed to run concurrently with the sentence imposed in the United States District Court for the Eastern District of Wisconsin. No fine was imposed.

THE INDICTMENT

65 CR 266 is in Four Counts.

Count One (1) alleges that from July to September, 1964, in the Federal District, Giulio Bruni, Alfred Bruni, and Fulvio Smaldone and John G. Johnson (a co-conspirator but not a defendant), knowingly and unlawfully conspired to make $3,000,000.00 in counterfeit $5 and $10 currency of the United States with intent to defraud in violation of Section 471, Title 18, U.S.C. and further alleges overt acts to further the conspiracy by buying paper and a printing press in violation of Section 371, Title 18, U.S.C.

Count Two (2) (App. 8) alleges a substantive crime that on or about August 3, 1964, in the Federal District, Giulio Bruni, Alfred Bruni and Fulvio Smaldone, defendants, and John G. Johnson (a co-conspirator but not a defendant) were unlawfully and feloniously in possession of metal plates now destroyed which bore an impression and likeness of $5 and $10 United States currency with intent to forge and counterfeit such securities in violation of Section 474, Title 18, U.S.C.

Count Three (3) (App. 10) alleges that on or about September 9, 1964, in this Federal District that Giulio Bruni, Alfred Bruni and Fulvio Smaldone, defendants, and John G. Johnson and Raymond P. Spencer, co-conspirators but not defendants, conspired unlawfully and knowingly at divers places to pass forged and counterfeit obligations of the United States with intent to defraud in violation of Section 472, Title 18, U.S.C. and committed overt acts in furtherance of said conspiracy.

The indictment further charged that the defendants had conversations with John G. Johnson and engaged in acts of passing counterfeit $20 Federal Reserve Notes on September 13, 1964, at Lowell and Astico, Dodge County,

Wisconsin, situated in the Eastern District of Wisconsin (Milwaukee) in violation of Section 371, Title 18, U.S.C.

Count Four (4) of the indictment alleges a substantive crime against Giulio Bruni in that he possessed and concealed counterfeit $20 Federal Reserve Notes in his residence at River Forest, Illinois, in violation of Section 472, Title 18, U.S.C.

FACTS:

Co-conspirator, John G. Johnson, not indicted, testified in this case for the Government.

Co-conspirator, Raymond P. Spencer, not indicted, testified for the defendant, Giulio Bruni.

Alfred Bruni, a defendant, left the United States before Indictment; has not been tried.

Fulvio Smaldone, a defendant, was acquitted in this case.

QUESTIONS PRESENTED

Should a conviction be sustained upon all counts of the indictment based upon the evidence presented by the Government?

STATUTES INVOLVED

18 U. S. C. A. 371.

18 U. S. C. A. 472.

18 U. S. C. A. 474.

JURISDICTION

The date of the judgment to be reviewed is May 6, 1965. Appellant's petition for rehearing was denied on May 17, 1966. Jurisdiction to issue the Writ is under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A., Sec. 1254). Based on Title 28, U.S.C. 1940 Ed. Sec. 346 and 347 (March 3, 1911, C. 231, Sec. 239, 240, 36 Stat. 1157; Feb. 13, 1925, C. 229, Sec. 1, 43 Stat. 939; Jan. 1, 1928, C. 14, Sec. 1, 45, Stat. 54; June 7, 1934, C. 426, 48 Stat. 926). (From Revisors Note, Title 28, U.S.C.A. Judiciary and Judicial Procedure, Sec. 1254, P. 42).

REASONS FOR ALLOWANCE OF THE WRIT

That the Government failed to prove the defendant guilty beyond a reasonable doubt.

That the lower court erred in finding the defendant guilty on all counts.

That the evidence viewed in a light most favorable to the Government fails to support the judgment of the lower court.

That the trial and conviction in this case constitutes double jeopardy.

ARGUMENT.

The defendant, Giulio Bruni, filed his Motion of Double Jeopardy which was overruled. His motion was predicated upon the fact that he was indicted and tried for the same offense in the Eastern District of Wisconsin, docketed in this court as number 1364.

All the witnesses who testified in the Milwaukee case also testified in the Chicago case. All the evidence presented in the Milwaukee case was presented in the Chicago case, except the photographs.

This defendant stood trial in the different courts in two different jurisdictions for the same offense charged by the same complainant.

The conviction in the Milwaukee case should bar the prosecution in the Chicago case even though the court in this case sentenced defendant to concurrent sentences.

In *Re: Nielsen,* 131 U.S. 176, the Court said:

> "Where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it he cannot be second time tried for one of those incidents without being put in jeopardy for the same offense."

Other cases supporting this principle are:

Tritico v. *U. S.,* 4 F.2d 644;
Carter v. *McClaughry,* 183 U.S. 365;
Burton v. *U. S.,* 202 U.S. 344;
Gravieres v. *U. S.,* 220 U.S. 338;
Morgan v. *Devine,* 237 U.S. 632;
Eberling v. *Morgan,* 237 U.S. 625.

The principle rule established is that if the same evidence will support a verdict of conviction on both offenses, a prosecution for one will bar a prosecution for the other.

COUNT I

The defendants, Giulio Bruni and Fulvio Smaldone, both testified and both denied that the purchase of a printing press, paper, ink, and other materials was for an illegal purpose, but rather to print forms for a hospital which Dr. Bruni had recently organized and opened. The only testimony to support the charge in this count came from John G. Johnson, a co-conspirator and a self-admitted perjurer and liar.

COUNT II

Again, the defendants testified that neither ever had possession of plates to print counterfeit United States currency. It is significant that no plates were ever found, nor were any samples produced. Again, the only testimony to support this count came from co-conspirator John G. Johnson.

COUNT III

The charges set forth in Count Three (3) of the indictment are that Johnson and Raymond Spencer, co-conspirator, and Fulvio Smaldone, Alfred Bruni, and Giulio Bruni, defendants, agreed and conspired to unlawfully and wilfully to pass and utter with intent to defraud counterfeit obligations of the United States in violation of Section 472, Title 18, U.S.C. and committed the following overt acts:

(1) That on September 9, 1964, they had a conversation (except Spencer)

(2) That on September 11, 1964, they met at Giulio Bruni's house (except Spencer)

(3) That on September 13, 1964, Giulio Bruni passed a counterfeit $20 bill on one, Marie Rahn, at Lowell, Wisconsin.

(4) That on September 13, 1964, Giulio Bruni passed a counterfeit $20 bill on Herbert Monthie, at Astico, Wisconsin in violation of Section 471, Title 18, U.S.C.

In order to prove these charges, the prosecution produced the testimony of the following individuals: Harold Ring, Sr., Harold Ring, Jr., Albert Walters, Herbert Monthie, Emma Frank, Maurice Kuenzi, Marie Rahn, Harold Rahn, Roger Kreitzman, Gerald Fehrman, Robert Shotola, Samuel Lindsay and John Sokoll.

These witnesses all testified to the same facts and circumstances in the Milwaukee case. These witnesses positively identified Dr. Bruni in court, although the occasion was such that not one of these witnesses described Dr. Bruni when police officers and secret service agents were making an on-the-spot investigation. It was only after pictures were shown to them; viewing him at his arraignment in court; and at the trial that they were able to positively identify him. This was the second time these witnesses had the opportunity of identifying the defendant.

Positive identification of Dr. Bruni by the testimony of the Milwaukee witnesses should be scrutinized with extreme care. (*Fisher* v. *U. S.*, 231 F.2d 99). No class of testimony is more uncertain and less to be relied upon than that on identity. The possibility of human error in absence of prior familiarity with the defendant is to be proven by that degree of moral certainty that amounts to proof beyond a reasonable doubt so as to preclude any probability of mistake. The reliability of such testimony depends upon the impression obtained by such witnesses in haste; in a matter of seconds in which to observe the person. (*Sibona* v. *U. S.*, 294 Fed. 272).

COUNT IV

Charges that the defendant on September 24, 1964, at his home in River Forest, Illinois, did knowingly and wilfully possess and conceal two counterfeit $20 U. S. Notes with intent to defraud in violation of Section 472, Title 18, U.S.C.

In support of the charge in Count Four, the Government produced the testimony of Secret Service Agents Nemo Ciochina (App. 274-280) and Richard Sheridan (App. 284-298). Thse two agents among others arrested Giulio Bruni at about 2 A.M. on September 24, 1964, in the driveway of his home; he was handcuffed and told he was under arrest for counterfeiting, Secret Service Agents Ciochina, Sheridan, Clem, and Gorman participated in the arrest and in the search of Dr. Bruni's house. After several hours of searching, two counterfeit notes dropped to the floor. (Govt. Ex. Nos. 39 and 40). They called Dr. Bruni into the sunroom and showed him the bills. Dr. Bruni then and there denied any knowledge of their existence. Kathy Spencer, a defense witness, was in the living room when this alleged finding took place. From where she sat she could hear Agent Sheridan in the other room call his office and report that, "he had no luck", in finding any evidence. It was after this incident that Agent Ciochina allegedly found the two counterfeit notes.

To constitute the possession of forged instruments a crime, the possessor must be actuated by a criminal intent to defraud and to pass, utter, publish and sell such instruments. (*U. S.* v. *Barrett,* 111 F. 369) (*U. S.* v. *Kelley,* 186 F.2d 598; *U. S.* v. *Karll,* 105 U.S. 611; *U. S.* v. *Ruffino,* 67 F.2d 440).

Such evidence was found under such peculiar and strange circumstances as to confirm Dr. Bruni's denial of possessing such counterfeit bills. Where a person charged with crime, has previously been of good character, his denial of that fact should be considered with the other evidence in determining his guilt or innocence. (*Michelson* v. *U. S.*, 335 U.S. 469; *Fisher* v. *U. S.*, 231 F.2d 99).

The defendant is presumed innocent and this presumption continues throughout the trial and is overcome when and only when his guilt is established beyond a reasonable doubt. (*Helton* v. *U. S.*, 231 F.2d 654; *U. S.* v. *Mann*, 108 F.2d 354). The testimony of Ciochina and Sheridan is of a doubtful and unreliable nature. The question is not whether guilt may be spelled out of a record but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. (*U. S.* v. *Palermo*, 250 F.2d 872, p. 881).

CONCLUSION

Wherefore, petitioner prays that this Court allow this Petition for Certiorari and grant the Writ of Certiorari to the Circuit Court of Appeals, Seventh Circuit.

Respectfully submitted,

JOSEPH I. BULGER,
Attorney for Petitioner.

APPENDIX

SEPTEMBER TERM, 1965 — APRIL SESSION, 1966

No. 15256

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GIULIO BRUNI, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

APRIL 20, 1966

Before DUFFY, CASTLE and KILEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* The indictment in this case contained four counts. Count 1 charged defendant and others with conspiring from July to September, 1964, to make, forge and counterfeit with intent to defraud, $3,000,000 in $5 and $10 currency of the United States, in violation of Title 18, U.S.C. § 471. This count alleged certain overt acts in furtherance of the conspiracy, including the purchase of a certain type of paper, and a printing press.

Count 2 charged that on or about August 3, 1964, defendant and others were unlawfully in possession of metal printing plates which bore the impression of $5 and $10 United States currency, in violation of Title 18, U.S.C. § 474.

Count 3 charged defendant and certain co-defendants and co-conspirators with unlawfully conspiring to pass forged and counterfeit obligations of the United States with intent to defraud in violation of Title 18, U.S.C. § 472.

Count 4 charged defendant with having possessed and concealed counterfeit $20 Federal Reserve notes at his residence in River Forest, Illinois, in violation of Title 18, U.S.C. § 472.

Defendant waived trial by jury. A plea of double jeopardy on behalf of Giulio Bruni was filed, argued and overruled. At the close of all of the evidence, motions of acquittal were filed by defendants Giulio Bruni and Fulvio Smaldone. Smaldone's motion was granted and he was found not guilty. Bruni's motion was denied and he was found guilty as charged in the indictment.

In connection with the plea and arguments claiming double jeopardy, frequent mention is made of the "Milwaukee Case" wherein defendant Giulio Bruni and others were indicted and tried in the Eastern District of Wisconsin.

Count 1 of the indictment in the Milwaukee Case charged Bruni with having conspired to violate Title 18, U.S.C. § 472, but this count was dismissed prior to the trial.

Counts 2 and 3 charged Bruni with having passed and uttered, on September 13, 1964, falsely made and counterfeit Federal Reserve Bank Notes at Lowell and Astico, Wisconsin.

Counts 4, 5 and 6 were charges against co-defendant John G. Johnson who, after being granted a separate trial, entered a plea of guilty and testified for the government in defendant Bruni's trial.

In the Milwaukee Case, the jury found defendant Bruni guilty on both counts 2 and 3. He was sentenced to imprisonment for five years on each count, but the sentences were to be concurrent. He also was assessed a total fine of $10,000. On appeal to this Court, the judgment of conviction was affirmed. *United States of America* v. *Giulio Bruni* (No. 15176), ... F. 2d .... (March 18, 1966).

In the instant case, defendant argues that the government failed to prove his guilt beyond a reasonable doubt. He also attacks the testimony of co-conspirator Johnson and the secret service agents who searched the Bruni house. The agents testified they found two counterfeit notes in a cabinet in the Bruni home. Defendant says this testimony "is of a doubtful and unreliable nature."

It is, of course, fundamental that the evidence herein must be viewed in the light most favorable to the government. Furthermore, this Court has repeatedly refused to weigh the credibility of witnesses or the weight of their testimony on controverted issues of fact. *United States* v. *Mims*, 7 Cir., 340 F.2d 851.

The only issue raised by defendant that merits any discussion is the claim that his conviction in the Milwaukee Case bars the instant prosecution and conviction on the ground of double jeopardy.

As hereinbefore indicated, the conspiracy charge in count 1 of the indictment in the Milwaukee Case was dismissed prior to the trial. Defendant Bruni was convicted only as to counts 2 and 3 of that indictment. Both of these counts charged substantive offenses of passing counterfeit Federal Reserve Bank Notes on September 13, 1964, at Lowell, Wisconsin and at Astico, Wisconsin.

In *Pereira* v. *United States,* 347 U.S. 1, 11, the Supreme Court stated: "It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both."

Defendant insists that since the same general testimony was adduced in both cases, his plea of former jeopardy must be sustained. He argues that the government having made a choice to try him in the Milwaukee district, should be estopped from further prosecution.

Pertinent is the statement of the Court in *United States* v. *Kramer,* 2 Cir., (1961) 289 F.2d 909, 913—"Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the 'same' only when 'the evidence required to support a conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other'. . . ."

We hold the conviction of Bruni for the two substantive offenses in the Milwaukee Case does not bar his conviction in the instant case. See *United States* v. *Jones,* 7 Cir., 334 F.2d 809, cert. den. 379 U.S. 993; *Bocock* v. *United States,* 7 Cir., 216 F.2d 465; *United States* v. *Thomas,* 6 Cir., 342 F.2d 132.

There is some uncertainty as to the terms of the sentence in the instant case. On pages 1262 and 1263 of the transcript of proceedings, the trial court, in the presence of the defendant, stated "The Court: He (Bruni) will be remanded to the custody of the Attorney General for a term of five years to run concurrently with the sentence imposed by Judge Grubb in the Eastern District of Wisconsin."

In the judgment of conviction which was thereafter filed, it is stated that the defendant is committed for a period of five years, but there is no statement as to the sentence being concurrent with the sentence imposed in the Milwaukee Case. This change, which probably was inadvertent, should have the attention of the District Court upon remand.

As the conviction below was not barred by the rule of double jeopardy, and as no prejudicial error was committed by the trial court, the judgment of conviction is affirmed with suggestions to the District Judge, upon remand, to reconcile the provisions in the judgment of conviction with the statement made by the Court in defendant's presence at the time of sentencing.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 234

GIULIO BRUNI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a jury-waived trial in the United States District Court for the Northern District of Illinois, Eastern Division, petitioner was convicted on all four counts of an indictment charging him with conspiring to forge and counterfeit currency of the United States (Count I), unlawful possession of printing plates (Count II), conspiring to pass counterfeit obligations of the United States (Count III), and possession and concealment of counterfeit Federal Reserve notes (Count IV). He was sentenced to a term of five years in prison, to run concurrently with a five-year sentence which he had been given by the United States District Court for the Eastern District of Wisconsin for passing and uttering counterfeit Federal Reserve notes (Pet. App. 4). The Court of Appeals for the Seventh Circuit affirmed both convictions (359 F. 2d 807 and 802, respectively). A petition for a writ of

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certiorari to review the Wisconsin conviction is now pending before this Court (No. 182, this Term).

1. The earlier conviction in the Eastern District of Wisconsin was on two counts of an indictment charging petitioner with passing and uttering counterfeit Federal Reserve notes at Lowell, Wisconsin, and Astico, Wisconsin, on September 13, 1964. The same two acts were cited by the prosecution as among the overt acts done in furtherance of the conspiracy alleged in Count III of the instant indictment (Pet. 6–7), and evidence of these overt acts was admitted at the trial below (Pet. 7). Petitioner contends that the specification and proof of the two acts of September 13, 1964, as overt acts pursuant to the Count III conspiracy twice placed him in jeopardy in violation of the Fifth Amendment. However, in the proceeding in the Eastern District of Wisconsin he was not tried on a charge of conspiracy—that count having been dropped by the prosecution before trial—but only on the substantive counts, which charged separate and distinct offenses from the conspiracy to commit them, and thus did not bar his later prosecution for that conspiracy. *Pereira* v. *United States*, 347 U.S. 1, 11; *United States* v. *Bayer*, 331 U.S. 542; *Pinkerton* v. *United States*, 328 U.S. 640, 644. In any event, since a five-year sentence was authorized by each of the statutory provisions under which petitioner was convicted, any one of the four counts will support the sentence. The counts other than conspiracy were clearly separate and distinct from the offense charged in the Wisconsin trial.

2. Petitioner's only attack upon his conviction on Counts I, II and IV is that the evidence was incredible. Both courts below having found the evidence sufficient, there is no occasion for further review. *Scales* v. *United States,* 367 U.S. 203; *United States* v. *Johnson,* 319 U.S. 503.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966